90-1688

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FOSTER McGAW HOSPITAL OF LOYOLA UNIVERSITY OF CHICAGO, et al.,

Petitioners,

v.

BUILDING MATERIAL CHAUFFEURS, TEAMSTERS AND HELPERS WELFARE FUND OF CHICAGO, LOCAL 786,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's decision in *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101 (1989) mandates the use of an "arbitrary and capricious" standard of review for a challenge of a denial of benefits by a trustee with discretionary authority to interpret and construe terms and eligibility of a health and welfare fund established under the Employee Retirement Income Security Act (ERISA) when the only dispute concerns a question of fact not related to the construction or interpretation of the plan.

2. Whether the Court of Appeals erred by engaging in a determination of the facts in dispute without first remanding the case to the District Court for a clarification of its findings under the appropriate standard of review.

3. Whether the Court of Appeals used the incorrect standard of review in deciding this matter, and, if so, then the Cross-Appeal of Plaintiffs for attorney fees is not moot and should be decided.

SUPREME COURT RULE 29.1 STATEMENT

The Petitioners in this matter, Foster G. McGaw Hospital of Loyola University of Chicago, and the Loyola Medical Practice Plan, do not have any parent or subsidiary companies.

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FOSTER McGAW HOSPITAL OF LOYOLA UNIVERSITY OF CHICAGO, et al.,

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v.

BUILDING MATERIAL CHAUFFEURS, TEAMSTERS AND HELPERS WELFARE FUND OF CHICAGO, LOCAL 786,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORTS OF OPINIONS

This matter was filed in the United States District Court for the Northern District of Illinois under case number 89 C 44. An opinion was issued on November 27, 1989, 1989 U.S. Dist. Lexis 14310, and another opinion was issued upon rehearing on April 9, 1990, 1990 U.S. Dist. Lexis 4015.

In the United States Court of Appeals for the Seventh Circuit, the Defendant's Appeal was filed under case number 90-2014, and the Plaintiffs' Cross-Appeal was filed

under case number 90-2098. The Court of Appeals decision was published in the Federal Reports at 925 F.2d 1023 (7th Cir. 1991).

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. § 1254(1) seeking review of the Opinion issued by the United States Court of Appeals for the Seventh Circuit on February 12, 1991 reversing a judgment in favor of the Plaintiffs entered by the United States District Court for the Northern District of Illinois.

A Petition for Rehearing was denied on March 8, 1991 by the Court of Appeals.

STATEMENT OF THE CASE

At the end of his shift on November 3, 1987, Anthony McGinty and a friend were repairing a "Bobcat," a small tractor with a hydraulic lift, on their employer's premises, in an attempt to adapt it for personal use in a snow removal capacity. The Bobcat jumped into gear and pinned McGinty against a wall, causing severe injuries. Those injuries ultimately led to his death on November 18, 1987. Before he died, McGinty incurred hospital and physician charges in excess of $88,000.00 at Foster G. McGaw Hospital of Loyola University of Chicago and at the Loyola Medical Practice Plan.

McGinty had health insurance coverage under a health and welfare fund, covered by ERISA, from the Building

Material Chauffeurs, Teamsters and Helpers Welfare Fund of Chicago, Local 786. The Fund denied benefits, claiming that the injuries arose out of the course and scope of employment, and were therefore not covered under the Fund's Summary Plan Description. After pursuing the administrative remedies set forth by the Plan, which did not produce a change in the Fund's decision, a lawsuit was commenced in the United States District Court for the Northern District of Illinois seeking benefits due a participant or beneficiary under ERISA, 29 U.S.C. § 1132(a)(1)(B).

On November 27, 1989, the District Court entered a judgment in favor of the Plaintiffs, finding the decision of the trustees to be arbitrary and capricious and clearly erroneous. Appendix, page 10a. The Fund then filed a motion for a new trial and Plaintiffs' filed a motion for attorney's fees. On April 9, 1990, an Order was entered which denied the motion for a new trial, but amended the amount of the judgment to reflect the amount of benefits available under the Plan. Appendix, page 19a. Additionally, the District Court denied Plaintiffs' motion for attorney's fees, finding that under a de novo review, the Fund's denial was not without merit, but that the Court had simply reached a different factual conclusion. Appendix, page 23a.

On appeal to the Seventh Circuit, the Appellate Court held that the case was to be decided under a deferential, not de novo, review, and applied the arbitrary and capricious standard of review to this case. The Appellate Court reversed the judgment entered in favor of the Plaintiffs and directed the District Court to enter judgment in favor of the Fund. The Appellate Court also found that Plaintiffs' Cross-Appeal for attorneys fees was moot, and dismissed that portion of the appeal. Appendix, page 8a.

Petitioners' submission of this Petition for a Writ of Certiorari followed.

ARGUMENT

A. Deferential review of a trustee's denial of benefits under an ERISA plan where the trustee has discretionary authority to construe and interpret disputed or doubtful terms does not require a finding that the decision was arbitrary and capricious under *Firestone*.

In *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101 (1989) this Court stated that much of ERISA's language and terminology suggest the application of trust law and principles to claims being made under ERISA. "In determining the appropriate standard of review for actions under section 1132(a)(1)(B), we are guided by principles of trust law." *Firestone*, 489 U.S. at 111, citing *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985). While trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers, Restatement (Second) of Trusts, section 187 (1959), a trustee's interpretation will not be disturbed if "reasonable." Bogert & Bogert, Law of Trusts and Trustees, section 559, pp. 169-171.

A "reasonable" standard of review in situations where a trustee exercises discretionary authority would be consistent with trust principles and the Court's decision in *Firestone*, rather than the stricter arbitrary and capricious standard of review. Since this Court has held that trust principles are to be applied, the arbitrary and capricious standard of review used by the Court of Appeals is inconsistent with the holding of *Firestone*.

However, *Firestone* is mainly concerned with situations where there are disputed or doubtful terms within the Plan itself. In this case, there are no disputed or doubt-

ful terms which need to be construed in the summary plan description. Instead, the dispute here is a factual one—was the accident which caused the injury to McGinty an accident incurred in the course and scope of his employment?

The fund, despite all of the evidence and case law to the contrary, claims that this particular accident was incurred in the course and scope of employment, and therefore denies coverage for this injury. In support of their position, the fund claims that since the accident occurred on the employer's premises, and because one individual "thought" he saw the machine that caused the injury on the employer's lot weeks before the accident happened, there is no liability to the fund.

This position is contradicted by the direct testimony of others who clearly testified that McGinty and his partner purchased the Bobcat days before the accident for their own personal use. In addition, the Fund totally ignored the documentary evidence in the form of the bill of sale showing that the Bobcat was purchased by McGinty and his partner just days before the accident.

The trustees based their determination on speculative hearsay evidence which was irrefutably impeached and contradicted by the available testimony and documentary evidence. Further, they chose to disregard three Illinois Supreme Court decisions directly on point which define when an injury is incurred in the course and scope of employment while servicing personal vehicles on the employer's premises. See *Orsini v. Industrial Commission*, 117 Ill. 2d 38, 509 N.E.2d 1005 (1987); *Fisher Body Division of General Motors Corp. v. Industrial Commission*, 40 Ill. 2d 514, 240 N.E.2d 694 (1968); and *Mazursky v. Industrial Commission*, 364 Ill. 445, 4 N.E.2d 823 (1936).

The fund is using *Firestone* to shield themselves from judicial review by asserting that their discretionary authority to construe disputed or doubtful terms of the plan gives them the right to make final determination of disputed factual issues and rely on factors which no court would ever consider. Their position would allow the fund to deny benefits if there is any matter in evidence, no matter how ridiculous or incredible that evidence may be, and thereby withstand any judicial review. Under this thinking, a trustee could base a denial on the belief of an individual who was not in a position to know the facts firsthand, and totally disregard the testimony and supporting evidence of the individuals directly involved in the situation. Such a result is not the intent of the Court's holding in *Firestone*, and indeed, it directly contradicts Congress' intent that the trustees act in a manner which should *provide* benefits to a participant. 29 U.S.C. § 1104(a)(1)(A)(i).

Congress surely could not have intended that a fiduciary be given both legislative powers—by being able to enact a health and welfare fund under ERISA, and judicial powers—by being the only entity allowed to resolve questions of fact necessary to determine the appropriateness of the denial. The fund's reading of *Firestone* would necessarily lead to that result, and the Courts would become mere "rubber stamps" to validate any decision of the trustees if the arbitrary and capricious standard of review as dictated by the fund were adopted.

Absent a court's ability to act as the final trier of facts, abuses of discretion by a fund with discretionary authority, defined the way the Defendant would suggest, leaves a participant with no recourse against a trustee that has denied benefits under a plan which was designed to provide benefits to that participant. Regardless of the standard of review to be used when a trustee is construing

disputed or doubtful terms of the plan, a court must necessarily partake in a de novo review of the underlying facts supporting the fund's position. Once all factual disputes have been resolved, then the Court may give the degree of deference to the trustees in their application of those facts to the terms of the plan.

This would be perfectly consistent with the trust principles and the holding in *Firestone*, as the trustees would have the right to make their determinations according to the terms of the plan without fear of judicial inquiry into their establishment and construction of plan requirements, so long as their application of the facts to the plan were reasonable. Indeed, anything less than that degree of judicial oversight could possibly result in the impermissible transfer of judicial power to a non-judicial entity, and would give rise to an impermissible delegation of power of judicial review to a private non-judicial party.

B. The Appellate Court erred by engaging in a determination of the facts in dispute without remanding the case to the District Court to reconcile its two findings.

If there was a question of fact that was not resolved by the District Court, or if there was some confusion from the two orders and opinions issued by the District Court in this case, then the Court of Appeals should not have engaged in a fact finding mission. Instead this case should have been remanded to the District Court to reconcile its two opinions. The Court of Appeals should not be left to guess what the District Court was "implying" in its decisions, especially since the District Court decided the first opinion under an arbitrary and capricious standard of review and the second one under a de novo review.

Clearly, any situation which is found to satisfy an arbitrary and capricious standard of review would necessarily satisfy the lesser de novo standard. It is quite possible that the District Court merely found enough evidence in its second opinion to satisfy the lesser standard of review believed to be appropriate, without considering evidence or making a decision based on the higher standard of review. Considering the District Court's belief that the appropriate standard of review was a de novo standard, a finding that the decision of the trustees was arbitrary and capricious would not be necessary, eliminating the need for a finding of facts supporting such a determination.

The province of an appellate court is to review decisions of the District Court and correct any error of procedure or law made while reaching its decision. The Appellate Court is not a fact-finding court. To the extent that the Appellate Court sat as a fact-finding tribunal, or engaged in baseless speculation in order to reconcile the District Court's two decisions, it has abused its discretion.

C. If the Court of Appeals applied the incorrect standard of review, then Plaintiffs' Cross-Appeal is not moot and must be decided.

Finally, since the appellate court dismissed as moot Plaintiffs' Cross-Appeal, a reversal would require a rehearing on the attorney's fees issues raised in the cross-appeal.

In the Cross-Appeal, Plaintiffs have asserted that if they have standing to assert a claim for benefits under 29 U.S.C. § 1132(a)(1)(B), then they necessarily have standing to assert those remedial rights granted to participants and beneficiaries under 29 U.S.C. § 1132(g).

CONCLUSION

Since neither trust law nor this Court's decision in *Firestone* requires the application of the arbitrary and capricious standard of review to the resolution of a factual dispute in an ERISA fund's health benefits denial, the Appellate Court erred in granting the highest degree of deference to the Defendant. Since there were not any disputed or doubtful terms in the summary plan description which needed to be construed, it was error to apply the deferential standard of review to this case. By allowing that higher standard to insulate the trustees' decision, the Appellate Court has defeated Congressional intent to provide benefits to participants and beneficiaries in ERISA programs. A determination of the factual disputes in issue must always be reviewed under a less deferential standard by the Courts. Otherwise an aggrieved participant or beneficiary would be left with no judicial recourse against the abuses of a trustee.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-2014 and 90-2098

FOSTER MCGAW HOSPITAL OF LOYOLA UNIVERSITY OF CHICAGO, *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

v.

BUILDING MATERIAL CHAUFFEURS, TEAMSTERS AND HELPERS WELFARE FUND OF CHICAGO, LOCAL 786,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 0044—**William T. Hart,** *Judge.*

ARGUED JANUARY 22, 1991—DECIDED FEBRUARY 12, 1991

Before CUMMINGS, COFFEY, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* After the end of his shift on November 3, 1987, Anthony McGinty and a friend set to work on their employer's premises repairing a Bobcat (a small tractor with a hydraulic lift in front) to get it ready for the snow season. The Bobcat slipped into gear and pinned McGinty against the wall. Fifteen days later McGinty died of the injuries he had received. Foster McGaw Hospital and its medical practice group (collectively the

Hospital) incurred about $90,000 in charges during the effort to save McGinty. Their only source of repayment is McGinty's insurance benefits, which he assigned to them. If the Hospital thought itself lucky that McGinty was insured under two plans, it has been disabused. Each carrier denied responsibility, concluding that the other should pay.

One potential source of payment was the workers' compensation carrier of Thomas M. Madden Company, McGinty's employer. The other was the Building Material Chauffeurs, Teamsters and Helpers Welfare Fund of Chicago, Local 786, which underwrote a welfare plan covered by the Employee Retirement Income Security Act (ERISA). These sources are exclusive: the workers' compensation carrier is responsible for injuries in the course of employment, and the welfare fund for other injuries. The workers' compensation carrier concluded that the injury, which occurred after hours while McGinty was working on a machine he owned jointly with his friend, did not occur during the course of employment. The welfare fund concluded that because other employees said that they had seen the Bobcat on the employer's premises for several weeks being used in the employer's business, the injury was indeed in the course of employment.

One might suppose that this is an occasion for an "inverse interpleader": the provider of medical care sues both carriers, observes that one or the other owes it a debt, and leaves them to fight things out. Fed. R. Civ. P. 11 would not bar such a step, even if the provider thinks it knows which carrier ought to pay, any more than it bars the assertion of inconsistent positions in whipsaw cases under the tax laws. See *Centel Communications Co. v. CIR*, 920 F.2d 1335 (7th Cir. 1990). In whipsaw cases, as in normal interpleaders, the nominal plaintiff is a bystander to a fight among others, and it satisfies its duty by taking care to restrict the list of parties to the genuine contestants.

Joining both underwriters is easier said than done, however. ERISA supplies jurisdiction for suit against the wel-

fare fund. 29 U.S.C. §1132(a)(1)(B); see *Kennedy v. Connecticut General Life Insurance Co.*, No. 90-2283 (7th Cir. Feb. 6, 1991). Illinois law does not allow a provider of medical care to sue a workers' compensation carrier. See Ill. Rev. Stat. ch. 48 ¶138.5 (specifying who may recover under the workers' compensation act), *id.* at ¶138.21 (forbidding assignment of claims). So the Hospital would have to arrange for McGinty's estate to do so. Such a suit by the estate, supported neither by diversity of citizenship nor by ERISA, could not readily be appended to the Hospital's suit against the welfare fund. Lack of common parties would make the invocation of ancillary jurisdiction difficult, even under the Federal Courts Study Committee Implementation Act of 1990, §310 of which authorizes pendent party jurisdiction (renamed "supplemental jurisdiction"). See Pub. L. 101-650, 104 Stat. 5089.

Unable to see an attractive way to bring the workers' compensation carrier into the litigation, the Hospital sued only the welfare plan, which defended by arguing that its decision is neither arbitrary nor capricious. Such a standard of review creates the possibility that no one will pay in close cases. Each carrier may say that the other is responsible, and neither decision will be arbitrary. The provider will go without payment, despite the supposition that one carrier or the other is contractually obliged to pay. When two plaintiffs must file separate suits in separate courts—the estate against the workers' compensation carrier in state court under state law, the provider against the welfare fund in federal court under ERISA—the likelihood of this unhappy outcome goes up. Dovetailed plans are common, and disputes about the location of the boundary between them certain to recur. Congress might think it beneficial to allow consolidated litigation when a plan subject to ERISA interlocks with coverage governed by state law. Such litigation is as appropriate as the interpleaders authorized by 28 U.S.C. §§ 1335, 1397, and 2361, and Fed. R. Civ. P. 22. No "inverse interpleader" law is on the books, however, and the providers did not try to bring the workers' compensation carrier into the

suit. The hospital has not argued that the standard of review differs in whipsaw cases. As the case stands, we must assess the responsibilities of the welfare fund the same way we would if it were the sole potential source of payments.

The district court tried this case on stipulated facts after both sides waived the right to present testimony. Its first opinion, 1989 U.S. Dist. LEXIS 14310, says that the fund's denial of coverage was arbitrary and capricious. The court found that McGinty and friend bought the Bobcat for their personal use and that none of Madden's supervisors was aware of its presence on the firm's premises. Their after-hours repair work was accordingly not in the course of employment, making the welfare fund rather than the workers' compensation carrier liable. See *Orsini v. Industrial Commission*, 117 Ill. 2d 38, 509 N.E.2d 1005 (1987); *Fisher Body Division of General Motors Corp. v. Industrial Commission*, 40 Ill. 2d 514, 240 N.E.2d 694 (1968); *Mazursky v. Industrial Commission*, 364 Ill. 445, 4 N.E.2d 823 (1936), holding that the workers' compensation system does not cover injuries that occur while servicing private cars on the employer's premises.

On rehearing the district court shifted ground. 1990 U.S. Dist. LEXIS 4015. The fund pointed out that the judge did not mention evidence in the fund's possession that the Bobcat had been on the employer's premises for weeks and had been used in the employer's business. Whether or not the statements made to the fund's investigator were true, it argued, a decision based on such evidence is not arbitrary or capricious. Apparently agreeing with this submission, the court retracted its first opinion and substituted a new one engaging in *de novo* review on the authority of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). After reaffirming its conclusion that the fund is the responsible insurer, the court denied the Hospital's request for attorneys' fees because the fund's position was not without support. It explained: "The court has not held that the trustees' action was clearly errone-

ous. On *de novo* review the court reached a different factual determination than the trustees; the trustees' factual determination was not without some basis." Each side has appealed: the fund argues that *de novo* review is inappropriate and the Hospital that it should receive attorneys' fees.

Firestone does not require *de novo* review in every case.

> Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. . . . A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable.

489 U.S. at 111. Have the trustees of the welfare fund been given such discretionary power? Even if they have not, is there perhaps a difference between the standard of review when the trustees construe the terms of the plan and the standard when they make operational decisions? The fund does not urge the latter possibility, so we leave it for another day, as we did in *Petrilli v. Drechsel*, 910 F.2d 1441, 1446-47 (7th Cir. 1990). Whether review is deferential thus turns on the language of the plan, which the district court did not mention. In this court the parties agree that review is deferential, and that the district judge erred in disregarding language in this plan granting the trustees the power to construe the plan's terms. Part IV Art. I §1(b) of the trust instrument gives the trustees authority

> [t]o determine all questions arising in the administration, *interpretation and application* of the Health and Welfare Plan, including questions of eligibility . . .

Emphasis added. Under *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990), and *Exbom v. Central States Health & Welfare Fund*, 900 F.2d 1138, 1141-42 (7th Cir. 1990), both announced after the district court's decision, language of this stripe requires deferential review.

Although the district judge's first opinion concluded that the Hospital prevails even if the fund receives the benefit of deferential review, the judge later thought better of that view. His second opinion implies, if it does not hold, that deferential review leads to victory for the fund. That conclusion is inescapable. The fund sent an investigator to interview Madden's employees, several of whom said that they had seen the Bobcat on the premises for weeks, occasionally being used in the firm's business. The Hospital sought to undermine this by pointing to the bill of sale, which showed that McGinty and friend bought the Bobcat only three days before the accident. The fund's investigator tried to interview the seller, who refused to cooperate; although the lawsuit gave the Hospital access to compulsory process, it elected not to present the seller's testimony. It was not "arbitrary" or "capricious" to credit the testimony of McGinty's fellow employees over the implications of the bill of sale, and to infer that the Bobcat's repair would have inured to the employer's benefit, drawing the accident within the scope of workers' compensation coverage. Perhaps the document was created after the fact; perhaps delivery took place before the date of sale shown in the paper. The fund's trustees considered the evidence and chose one version over another. State courts usually resolve disputes about the scope of employment in favor of coverage by the workers' compensation program; the trustees reached the same conclusion. *De novo* review might lead to a different conclusion, but the district judge was right to recognize in his second opinion that deferential review requires a court to respect the trustees' resolution of such conflicts. E.g., *Pokratz v. Jones Dairy Farm*, 771 F.2d 206 (7th Cir. 1985).

Foster McGaw Hospital has been caught in the midst of a dispute between insurers. It is entitled to payment yet receives none. Such an outcome produces unease, and perhaps it should produce legislation along the lines we have discussed. But in this one-on-one suit, Hospital against welfare fund with the fund's decision entitled to deference, the outcome is foredoomed. The judgment is reversed on

the fund's appeal, and the case is remanded with instructions to enter judgment for the fund. The Hospital's appeal is dismissed as moot.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: February 12, 1991

BEFORE:
Honorable Walter J. Cummings, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge

Nos. 90-2014 and 90-2098

FOSTER G. MCGAW HOSPITAL OF LOYOLA UNIVERSITY OF CHICAGO, LOYOLA MEDICAL PRACTICE PLAN,
Plaintiffs-Appellees/Cross-Appellants

v.

BUILDING MATERIAL CHAUFFEURS, TEAMSTERS & HELPERS WELFARE FUND OF CHICAGO LOCAL 786,
Defendant-Appellant/Cross-Appellee

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 89 C 44, Judge William T. Hart

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, REVERSED, with costs, and REMANDED with instructions to enter judgment for the fund as to No. 90-2014, and DISMISSED as moot as to No. 90-2098, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 8, 1991.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

FOSTER MCGAW HOSPITAL OF LOYOLA UNIVERSITY OF CHICAGO, *et al.*,

Plaintiffs-Appellees, Cross Appellants,

Nos. 90-2014 and 90-2098 v.

BUILDING MATERIAL CHAUFFEURS, ETC., LOCAL 786,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 89 C 0044—William T. Hart, *Judge.*

ORDER

Plaintiffs-Appellees, Cross-Appellants filed a petition for rehearing and suggestion of rehearing en banc on February 26, 1991. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 89 C 0044 Date: Nov. 27, 1989

Name of Assigned Judge: WILLIAM T. HART

Case Title: FOSTER G. McGAW HOSPITAL, etc., et al. v. BUILDING MATERIAL CHAUFFEURS, etc., LOCAL 786,

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

Pursuant to Memorandum Opinion and Order, IT IS ORDERED that: (1) The decision of the trustees denying benefits is clearly erroneous, arbitrary, and capricious, and is hereby set aside. (2) The Clerk of the Court is directed to enter a judgment in the amount of $60,192.92 in favor of Foster G. McGaw Hospital of Loyola University of Chicago and against defendant Building Material Chauffeurs, Teamsters & Helpers Welfare Fund of Chicago, Local 786. (3) The Clerk of the Court is directed to enter a judgment in the amount of $28,071 in favor of plaintiff Loyola Medical Practice Plan and against defendant Building Material Chauffeurs, Teamsters & Helpers Welfare Fund of Chicago, Local 786.

* * * * *

(12) ☒ (For further detail see

☐ order on the reverse of

☒ order attached to
the original minute order form.)

* * * * *

[DATED NOVEMBER 27, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 89 C 0044

FOSTER G. McGAW HOSPITAL OF LOYOLA UNIVERSITY OF CHICAGO, and LOYOLA MEDICAL PRACTICE PLAN,
Plaintiffs,

v.

BUILDING MATERIAL CHAUFFEURS, TEAMSTERS & HELPERS WELFARE FUND OF CHICAGO, LOCAL 786,
Defendant.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

I.

Nature of the Case

Plaintiffs Foster G. McGaw Hospital of Loyola University of Chicago ("McGaw Hospital") and Loyola Medical Practice Plan ("Loyola Medical") are a hospital and physician group. From November 3, 1987 through November 18, 1987, Anthony McGinty was a designated beneficiary or certificate holder of a health insurance policy under a policy of group insurance issued by defendant Building

Material Chauffeurs, Teamsters & Helpers Welfare Fund of Chicago Local 786 ("Local 786") to members eligible for benefits under the terms of its welfare fund. Local 786's benefit trust was created pursuant to the authority of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* This court has jurisdiction over the controversy by reason of 29 U.S.C. § 1332(e).

On or about November 3, 1987, McGinty requested service from plaintiffs which they provided. McGinty was fatally injured in his employer's premises. Workers' compensation benefits were denied because it was stated that the incident occurred after employment hours, when McGinty was working on a private vehicle. However, defendant, which provides health benefits for "non-occupational" injuries, took the position that the claim should have been paid by the employer's workers' compensation carrier and denied benefits. Plaintiffs seek $60,192.92 for the hospital stay and $28,071 for physicians' charges.

The parties submitted this case to the court for decision based on the final pretrial order which includes exhibits. Neither side sought or requested a hearing for the purpose of submitting oral testimony.

II.

Findings of Fact

A.

Agreed Statement of Facts

The final pretrial order contains an Agreed Statement of Facts (Appendix A) which the court adopts as findings of fact as follows:

In November of 1987, Anthony McGinty was employed by the Thomas M. Madden Company located in Hodgkins, Illinois.

McGinty worked as a mechanic and a laborer. On the afternoon of November 3, 1987, McGinty was working on a machine located in the company yard. The machine was a Bobcat, which is a small tractor with a hydraulic lift attached to the front. McGinty was working with Patrick McNally and the two were repairing the machine. As they were working, the machine accidentally slipped into gear and pinned McGinty against a truck. McGinty received injuries to his chest, ribs, and lungs.

McGinty was taken to McGaw Hospital where he received medical treatment from the hospital and the physicians of Loyola Medical. McGinty died on November 18, 1987 from the injuries sustained on November 3, 1987.

A claim was made for workers' compensation benefits to pay the medical expenses incurred by McGinty prior to his death. The workers' compensation carrier denied coverage In a letter dated December 21, 1987, a representative of the carrier stated:

> The reason we felt this claim was not covered by the Workers' Compensation was because the claimant and a buddy were working on a piece of machinery after hours which did not belong to the insured. The buddy had brought in someone else's machinery specifically to use the insured's equipment to repair it. Mr. McGinty was unfortunate to have been helping him.
>
> Because of these reasons, we feel that the injury did not arise out of or in the course of his employment.

On November 3, 1987, McGinty was working as a union member pursuant to a contract with Local 786. His employer paid weekly contributions and he received coverage

in the Building Material Chauffeurs, Teamsters & Helpers Welfare Fund of Chicago.

The benefits provided by that Plan are contained in a Summary Plan Description. The Fund is administered by a Board of Trustees. The Fund denied the claim for benefits in this matter and plaintiff, McGaw Hospital, appealed to the trustees.

The trustees denied the claim and stated on October 24, 1988:

> The trustees of this Fund have reviewed the Claim Appeal of Foster G. McGaw Hospital for services rendered to Mr. Anthony McGinty on November 3, 1987 through November 18, 1987.
>
> After reviewing the information gathered by the Fund Staff and your letter of October 14, 1988, and attachments, the Trustees voted to deny coverage in this matter at the meeting held on October 18, 1988.
>
> As we have advised you, our Plan contains the following language:
>
> > All benefits, other than Life and AD & D Insurance, are non-occupational and are not payable for sickness covered by workman's compensation or injuries arising out of an employment for wage or profit.
>
> The Trustees determined that the above exclusion has been properly applied in this matter.
>
> Our investigation reveals that the facts in this matter may not have occurred as you outlined them in your letter of October 14, 1988.
>
> Finally, even if we were to accept your statement of facts, an accident which occurred in this matter would still be an injury arising from employment for profit.

> Please be assured that the Trustees have investigated the facts in this matter and have given your request every consideration.
>
> Your administrative remedies under this Plan have now been exhausted.

Following the Trustees' denial of benefits, plaintiffs commenced this lawsuit.

B.

Additional Findings of Fact

Based on the statements and documents submitted with the final pretrial order the court further finds the facts to be as follows:

1. On November 3, 1987, McGinty started work for Thomas Madden Construction Company at a job site on 27th Street off the Dan Ryan Expressway between 6:00 a.m. and 7:00 a.m. McGinty returned to the yard of the Company between 3:00 and 3:30 p.m. at which time his working hours for the day ended.

2. According to an interview of Pat McNally, who was in charge of the yard, McGinty and McNally began working on a vehicle referred to as a "bobcat" after 3:30 p.m. The vehicle was owned by McGinty and McNally. It had been purchased by them for their personal use in snow removal. No Madden official was aware of their work in the yard. The injuries to McGinty occurred at about 4:00 p.m. The unit jumped out of gear and pinned McGinty against a truck.

3. Plaintiff produced a form of Assignment of Insurance Benefits which on its face shows a signature by McGinty. This document was produced together with other business records of the hospital. Services were provided and ren-

dered on the basis of the assignment. It is admissible as a business record without testimony as to proof of McGinty's signature. Fed. R. Evid. 803(6). Defendant did not contest the validity of plaintiff's assignment in hearings before the trustees.

4. The injuries suffered by McGinty did not arise out of or in the course of his employment. McGinty and McNally were using their employer's yard for private activity not related to their employment.

5. The costs of services provided to McGinty by Foster McGaw Hospital is $60,192.92.

6. The cost of services provided to McGinty by the Loyola Medical Practice Plan is $28,071.

III.

Conclusions of Law

Plaintiffs provided hospital and medical services to McGinty upon the express assignment by him of hospital and medical benefits under an ERISA health and welfare plan operated by trustees of Local 786. As assignees, plaintiffs have standing to contest the trustees' decision to deny benefits. *Hermann Hospital v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1289-90 (5th Cir. 1988); *Misic v. Building Service Employees Health & Welfare Trust*, 789 F.2d 1374, 1376-77 (9th Cir. 1986) (per curiam); *Wisconsin Department of Health & Social Services v. Upholsters International Union Health & Welfare Fund*, 686 F. Supp. 708, 713-14 (W.D. Wis. 1988); *Kennedy v. Deere & Co.*, 118 Ill. 2d 69, 514 N.E.2d 171 (1987), *cert. denied*, 108 S. Ct. 1024 (1988).

The Illinois Workers' Compensation Act provides compensation for employees injured in the course of employ-

ment. Ill. Rev. Stat. ch. 48, ¶ 138.2 (1987). The words "arising out of" and "in the course of" are used conjunctively and both elements must be present at the time of the injury in order to justify compensation. *Mazursky v. Industrial Commission*, 364 Ill. 445, 4 N.E.2d 823, 824 (1936) (benefits denied for injury during company work hours while attempting to fix a flat tire on personal automobile); *Board of Education of Chicago v. Industrial Commission*, 321 Ill. 23, 151 N.E. 499 (1926) (benefits denied for school janitor injured by scuttle hole cover falling from school building while he did repair work on personal automobile in school yard); *Fisher Body Division, General Motors Corp. v. Industrial Commission*, 40 Ill. 2d 514, 240 N.E.2d 694 (1968) (benefits denied for injury in company parking lot when claimant's car battery exploded); *Orsini v. Industrial Commission*, 117 Ill. 2d 38, 509 N.E.2d 1005 (1987) (benefits denied to person injured while working on private vehicle on the company's premises).

McGinty and McNally were working after hours on a vehicle purchased for their personal use, not for the benefit of Madden Company. The injuries did not arise out of or in the course of McGinty's employment. It was a non-occupational injury.

The fact that McGinty and McNally hoped to operate the vehicle in the future for a profit did not bring the activity within an additional exception from the welfare plan based on employment for wage or profit. There is no showing that the repair work was based on a wage or profit. McGinty and McNally hoped that if the vehicle were repaired it could be used for wage or profit. No more than this is shown.

The decision of the trustees denying benefits was clearly erroneous. It is without support in the record. Under any standard of review it cannot stand. *See Firestone Tire &*

Rubber Co. v. Bruch, 109 S. Ct. 948 (1989); *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048 (7th Cir. 1987).

IT IS THEREFORE ORDERED as follows:

(1) The decision of the trustees denying benefits is clearly erroneous, arbitrary and capricious, and is hereby set aside.

(2) The Clerk of the Court is directed to enter a judgment in the amount of $60,192.92 in favor of plaintiff Foster G. McGaw Hospital of Loyola University of Chicago and against defendant Building Material Chauffeurs, Teamsters & Helpers Welfare Fund of Chicago, Local 786.

(3) The Clerk of the Court is directed to enter a judgment in the amount of $28,071 in favor of plaintiff Loyola Medical Practice Plan and against defendant Building Material Chauffeurs, Teamsters & Helpers Welfare Fund of Chicago, Local 786.

ENTER:

/s/ William T. Hart
UNITED STATES
DISTRICT JUDGE

Dated: November 27, 1989

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 89 C 0044 Date: April 9, 1990

Name of Assigned Judge: WILLIAM T. HART

Case Title: FOSTER G. McGAW HOSPITAL OF LOYOLA UNIVERSITY OF CHICAGO, et al. v. BUILDING MATERIAL CHAUFFEURS, TEAMSTERS & HELPERS WELFARE FUND, etc.

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

Pursuant to Memorandum Opinion and Order, IT IS ORDERED that defendant's motion for new trial is denied and its motion to amend judgment is granted. Plaintiffs' motion for fees is denied and their motion for costs is granted. The judgment entered on November 30, 1989 is vacated. The Clerk of the Court is directed to enter judgment in favor of plaintiff Foster G. McGaw Hospital of Loyola University of Chicago and against defendant in the amount of $48,494.34 and in favor of plaintiff Loyola Medical Practice Plan and against defendant in the amount of $22,556.80. Plaintiffs are also awarded $144.33 for costs.

Hart, J.

* * * * *

(12) ☒ (For further detail see
☐ order on the reverse of
☒ order attached to
the original minute order form.)

* * * * *

[DATED APRIL 9, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 89 C 0044

FOSTER G. McGAW HOSPITAL OF LOYOLA UNIVERSITY OF CHICAGO, and LOYOLA MEDICAL PRACTICE PLAN,

Plaintiffs,

v.

BUILDING MATERIAL CHAUFFEURS, TEAMSTERS & HELPERS WELFARE FUND OF CHICAGO, LOCAL 786,

Defendant.

MEMORANDUM OPINION AND ORDER

The parties agreed that this case could be resolved based on the final pretrial order which included exhibits. They agreed that the court could resolve factual disputes based on the exhibits. On November 30, 1989, a judgment was entered in favor of plaintiffs. The judgment was accompanied by findings of fact and conclusions of law dated November 27, 1989. Defendant timely moved for reconsideration.

Defendant argues the court failed to consider the evidence that would support a finding that the bobcat that injured Anthony McGinty was being used in the course of McGinty's employment. Although not expressly referred to in this court's findings, that evidence was considered. The evidence has again been examined and no reason is

found to change the finding that McGinty was performing personal activity when injured. Even if the bobcat was on the employer's premises for a few weeks, had previously been used to clear snow on those premises,[1] and the employer had considered purchasing it,[2] it was still owned by McGinty and McNally and there is no evidence the bobcat was still being used by the employer. Furthermore, McNally stated it was purchased for personal use. The finding will not be changed. However, it is more proper to state that this is a *de novo* finding of the court, *see Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948 (1989), not that the decision of the trustees was clearly erroneous.

Defendant also complains that the amount of damages awarded is incorrect because the limits and provisions of the relevant benefit plan are not taken into account. That information was not provided in the pretrial order, but the parties now agree that the correct amount of damages is $48,494.34 for the hospital and $22,556.80 for the Loyola Medical Practice Plan.

Plaintiffs seek attorney's fees pursuant to 29 U.S.C. § 1132(g)(1). That statute provides: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." Plaintiffs are not a participant, beneficiary, or fiduciary. They are assignees of a beneficiary. Under the literal language of the statute, they are not entitled to attorney's fees.

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[1] Even if true, such a fact could still be consistent with McGinty and McNally starting a snow removal business and independently contracting with their employer.

[2] Even if supported by live testimony, this would be hearsay of an employee and defendant only states the employee "believed" this was true, not that anyone knows this to be true.

The only case that has considered this issue held that assignees are not entitled to attorney's fees under § 1132(g)(1). *Kennedy v. Deere*, 118 Ill. 2d 69, 514 N.E.2d 171 (1987), *cert. denied*, 108 S. Ct. 1024 (1988).

Plaintiffs argue that they stand in the shoes of the beneficiary and therefore should be entitled to fees if the beneficiary would be. If the statute said, "a beneficiary is entitled to attorney's fees," then that argument would probably be sufficient. But that is not what the statute says. Instead, the statute expressly refers to who is bringing the action, not who has an entitlement. The present case is not one brought "by a beneficiary." Applying this literal interpretation of the statute is consistent with the standard applied under the statute, which, in part, takes into account who the winning and losing parties were and their status or position. *See generally Bittner v. Sadoff & Rudoy, Industries*, 728 F.2d 820, 828-30 (7th Cir. 1984). Also, an action by an assignee may actually be one under the federal common law, not one directly pursuant to 29 U.S.C. § 1132(a). *See Misic v. Building Service Employees Health & Welfare Trust*, 789 F.2d 1374, 1378 (9th Cir. 1986). If this is an action under the federal common law, then it is not an action under the subchapter and § 1132(g)(1) would not apply. *See Airco Industrial Gases, Inc. v. Teamsters Health & Welfare Pension Fund of Philadelphia & Vicinity*, 850 F.2d 1028, 1037-38 (3d Cir. 1988); *Local 738 I.B. of T. Food & Allied Employer's Health & Welfare Fund v. Dearborn Wholesale Grocers, Inc.*, No. 87 C 8478 at 6 (N.D. Ill. Dec. 13, 1988).

In any event, it need not be determined if § 1132(g)(1) applies to this case. Even if it does, no fees would be awarded. The applicable standard is set forth in *Bittner*, 728 F.2d at 828 (quoting *Janowski v. International Brotherhood of Teamsters*, 673 F.2d 931, 940 (7th Cir. 1982), *vacated on other grounds*, 459 U.S. 858 (1983)). The court

has not held that the trustees' action was clearly erroneous. On *de novo* review the court reached a different factual determination than the trustees; the trustees' factual determination was not without some basis. There is not bad faith or high culpability on the part of defendant. Presumably, the Fund has the resources to pay the fees, but that is money that would otherwise be used for the benefit of the beneficiaries of the Fund. Plaintiffs do not argue that awarding fees in this case would act as a deterrent or that the result benefitted the members of the Fund as a whole. The five factors set forth in *Janowski* are not the only factors that can be considered. *Bittner*, 728 F.2d at 829 (quoting *Marquardt v. North American Car Corp.*, 652 F.2d 715, 717 (7th Cir. 1981)). It would also be appropriate to consider that a hospital and private medical plan, not the beneficiary himself, was the prevailing party in this case. In light of the above facts, this is not an appropriate case for allowing fees. Plaintiffs will be allowed costs of $144.33.

IT IS THEREFORE ORDERED that defendant's motion for new trial is denied and its motion to amend judgment is granted. Plaintiffs' motion for fees is denied and their motion for costs is granted. The judgment entered on November 30, 1989 is vacated. The Clerk of the Court is directed to enter judgment in favor of plaintiff Foster G. McGaw Hospital of Loyola University of Chicago and against defendant in the amount of $48,494.34 and in favor of plaintiff Loyola Medical Practice Plan and against defendant in the amount of $22,556.80. Plaintiffs are also awarded $144.33 for costs.

ENTER:

/s/ William T. Hart
UNITED STATES
DISTRICT JUDGE

Dated: April 9, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 89 C 0044 Date: March 26, 1991

Name of Assigned Judge: WILLIAM T. HART

Case Title: Foster McGaw Hospital of Loyola University of Chicago, v. Building Material Chauffeurs, Teamsters & Helpers Welfare Fund

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

Consistent with the Seventh Circuit's mandate, *see Foster McGaw Hospital of Loyola University of Chicago v. Building Material Chauffeurs, Teamsters & Helpers Welfare Fund*, Nos. 90-2014, 90-2098 (7th Cir. Feb. 12, 1991), the Clerk of the Court is directed to enter judgment in favor of defendant and against plaintiffs dismissing plaintiffs' cause of action with prejudice.

* * * * *

[FILED MARCH 26, 1991]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Foster McGaw Hospital of Loyola University of Chicago,

v. Case Number: 89 C 0044

Building Material Chauffeurs, Teamsters & Helpers Welfare Fund,

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☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendant Building Material Chauffeurs, Teamsters & Helpers Welfare Fund and against the plaintiff Foster McGaw Hospital of Loyola University of Chicago dismissing plaintiffs' cause of action with prejudice.

Date March 26, 1991

H. STUART CUNNINGHAM
Clerk

/s/ William J. Stasiek
(By) Deputy Clerk